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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Document	Appendix
United States District Court for the Eastern District Findings and Recommendations	A
United States District Court for the Eastern District Order	B
United States Court of Appeals for the Ninth Circuit Order and Amended Opinion	C
United States Court of Appeals for the Ninth Circuit Order	D
Transcript of Police Interview	E

APPENDIX A

FILED
JUN 6 1997

Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY GENE HENRY,

Petitioner, No. CIV S-95-2055 DFL JFM

vs.

PEGGY KERNAN, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding by counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner's first federal habeas application, Henry v. Gomez, Case No. CIV S-92-1301 DFL JFM, was dismissed without prejudice on July 13, 1995, to

permit petitioner to exhaust state remedies. This court has granted respondents' motion to take judicial notice of the files and records in Case No. CIV S-92-1301.

Petitioner challenges his 1990 conviction of second degree murder in violation of California Penal Code § 187, with an enhancement for personal use of a firearm in violation of California Penal Code § 12022.5. Petitioner alleges that (1) his statements to police interrogators were elicited in violation of the Fifth Amendment and were improperly admitted for any purpose at trial because the statements were not made voluntarily and were made after petitioner's unequivocal invocation of his right to counsel: and (2) the trial court's admission of petitioner's statements to Dr. Sander violated petitioner's constitutional right to privacy.

FACTUAL AND PROCEDURAL BACKGROUND

On January 31, 1989, an information was filed in the Sacramento County Superior Court charging petitioner with murder. (Clerk's Tr. ("CT") at 167.) On January 11,

1990, a jury trial commenced. (CT at 260.) The trial ended on February 21, 1990, when a mistrial was declared because the jury deadlocked. (CT at 300.) A second trial commenced on June 12, 1990. (CT at 375.) The second trial ended on July 20, 1990, with petitioner's conviction of second degree murder. (CT at 610.)

The following factual background is quoted from the opinion of the California Court of Appeal, Third Appellate District, filed on April 16, 1992 in case number C010119:

> [Petitioner] admitted at trial that he had shot the victim, Bill Withrow. The two had engaged in business deals together and [petitioner] believed that either through cheating him or giving him bad advice Withrow had cost him substantial sums of money. [Petitioner] had repeatedly but unsuccessfully asked Withrow to repay the money he believed Withrow owed him.
>
> [Petitioner] testified that on the day in question he went to Withrow's office intending to yell at and scare Withrow into paying back some of the money. Withrow had previously shown [petitioner] a gun he kept in his desk drawer. In a previous discussion about debts, [petitioner] had grabbed Withrow

who had then implied [petitioner] might be injured if this happened again. [Petitioner] also believed one of Withrow's associates was a Hell's Angel. [Petitioner] was afraid of Withrow and therefore took two handguns with him when he went to Withrow's office.

[Petitioner] went in to Withrow's office and began asking about the money and yelling at Withrow. According to [petitioner], Withrow said that no one was going to keep him from being famous and reached toward the desk drawer which held his gun. [Petitioner] shot Withrow believing Withrow was about to shoot him.

[Petitioner] drove away but then stopped and called the police. He identified himself, told the operator he had killed Withrow and said that he wanted to surrender. [Petitioner] was distressed and said he had done something stupid and needed to be killed.

[Petitioner] was taken into custody and interviewed by the police the same day. This interview was taperecorded.

The officers initially gave the Miranda warnings and then the following exchange occurred:

[Officer]: You understand your rights Bobby?

[Petitioner]: I think so.

. . . .

[Officer]: . . . You have any questions about your rights.

[Petitioner]: (Inaudible) can I have my lawyer here, I don't

[Officer]: That's ah up to you; you're entitled to have an attorney present before you're questioned.

[Petitioner]: Right. Probably should have one now.

[Officer]: You do want an attorney?

[Petitioner]]: Yes, please.

[Officer]: Why did you shoot him anyway.

[Petitioner]: Pardon.

[Officer]: Why did you shoot him.

[Petitioner]: Cheated me out of money, I was loosing (sic) my property.

[Officer]: How much money you talking about.

[Petitioner]: I couldn't figure it out, it was so scrambled up, I think it was, I don't know, like, maybe fifty thousand.

[Officer]: How - how did he have your money, anyway.

[Petitioner]: I gave it to him.

[Officer]: Was it cash you gave to him.

[Petitioner]: I wrote him checks. Am I supposed to keep taking (sic) without an attorney. Was I --

[Officer]: Listen, what you tell us we can't use against you right now.

[Petitioner]: Okay.

[Officer]: We'd just like to know.

[Petitioner] then went on to describe his business dealings with Withrow and other problems he had had. He was crying at times during the questioning. [Petitioner] told the officer he did not know why he had taken the guns with him to Withrow's office. He also said he did not know why he had taken two guns.

Withrow was shot 10 to 13 times. There were several defensive wounds in his hands and one appeared to be a contact wound.

Two handguns were found in an open briefcase in Withrow's office. It appeared both had been fired. Another handgun was later found in Withrow's desk drawer.

Before trial [petitioner] moved to exclude evidence of his statement to the police. He argued his Miranda rights, right to counsel and privilege against self-incrimination had been violated and that the statement bad been coerced. Sacramento

County Sheriff's Lieutenant Harry Machen testified at the hearing on the motion that he had interviewed [petitioner]. Sheriff's Detective Robert White was also present. The interview had lasted about an hour.

Machen acknowledged [petitioner] had asked for a lawyer and that he continued questioning [petitioner] after he made this request. Machen said that he had told [petitioner] he wanted to know what had happened because the information could be valuable to the prosecution for impeachment purposes. Machen understood that even if a statement was obtained in violation of the Miranda rules it could skill be used for impeachment. In fact, he admitted that at the point when [petitioner] asked for an attorney and the questioning continued Machen understood the statement would be in violation of Miranda but that it could be used for impeachment. Machen also said that he "quite often" continues questioning a suspect after he or she invokes Miranda rights. It was also Machen's understanding that he was permitted to continue questioning a person even after the right to counsel is invoked.

Sheriff's Detective White testified at the hearing that he had made the statement that "what you tell us we can't use against you right now." He said this because although [petitioner]'s statement could not be used as an admission or confession it would be available for impeachment. White was also aware the statement was being taken in violation of Miranda.

The court ruled that Machen and White intentionally violated Miranda in order to obtain

[petitioner]'s statement for possible use in impeaching "petitioner] if he testified at trial. However, the

[Petitioner]: Okay.

[Officer]: We'd just like to know.

[Petitioner] then went on to describe his business dealings with Withrow and other problems he had had. He was crying at times during the questioning. [Petitioner] told the officer he did not know why he had taken the guns with him to Withrow's office.. He also said he did not know why he had taken two guns.

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Machen acknowledged [petitioner] had asked for a lawyer and that he continued questioning [petitioner] after he made this request. Machen said that he had told [petitioner] he wanted to know what had happened because the information could be valuable to the prosecution for impeachment purposes. Machen understood that even if a statement was obtained in violation of the Miranda rules it could skill be used for impeachment. In fact, he admitted that at the point when [petitioner] asked for an attorney and the questioning continued Machen understood the statement would be in violation of Miranda but that it could be used for impeachment. Machen also said that he "quite often" continues questioning a suspect after he or she invokes Miranda rights. It was also Machen's understanding that he was permitted to continue questioning a person even after the right to counsel is invoked.

Sheriff's Detective White testified at the hearing that he had made the statement that "what you tell us we can't use against you right now." He had said this because although [petitioner]'s statement could not be used as an admission or confession it would be available for impeachment. White was also aware the statement was being taken in violation of Miranda.

The court ruled that Machen and White intentionally violated Miranda in order to obtain [petitioner]'s statement for possible use in impeaching [petitioner] if he testified at trial. However, the court found the officers did not use false promises, deceit or improper inducement amounting to coercion. The court concluded the officer's assertion that [petitioner]'s statement

> could not be used against him "right now" was accurate and that the officer's statement that "We just wanted to know" was also true ~ because the officers were attempting to collect information about the crime. The court therefore found the People had established beyond a reasonable doubt that [petitioner]'s statement was voluntary. As a result the People were permitted to offer [petitioner]'s statement to impeach his credibility at trial.
>
> The court stated: "I regret that law enforcement officers such as the two that were here conduct themselves in that manner. But nevertheless I'm bound to follow the law."

During cross-examination of petitioner at trial, the prosecutor referred to statements made by petitioner during the police interrogation. (Reporter's Tr. ("RT") at 1139-40, 1142-46, 1149-52, 1154-55, 1163-66, 1177, 1184-85.) The prosecutor subsequently called Sheriff's Lieutenant Machen as a rebuttal witness and played for the jury the entire tape recording of petitioner's statements during the interrogation; each juror was provided with a copy of an unedited transcript of the interview. (RT at 1341 -42.)

ANALYSIS

A writ of habeas corpus is available under 28 U.S.C. § 2254 "only on the basis of some transgression of federal law binding on the state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), cert denied, 478 U.S. 1021 (1986). "It is unavailable for alleged error in the interpretation or application of state law." Id.; see also Givens v. Housewright, 786 F.2d 1378. 1381 (9th Cir. 1986).

I. Fifth Amendment Claim

Petitioner claims that the state trial court erred in allowing the introduction of statements he made to police officers after he requested counsel. He contends that the statements were introduced in violation of the Fifth Amendment because the statements were not made voluntarily and were not made pursuant to a waiver of the right to counsel.

To prevail on his Fifth Amendment claim, petitioner must demonstrate that his statements were obtained

by police interrogators in violation of the rules of custodial interrogation established by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), that the state trial court committed error in permitting the prosecution to use the product of the improper interrogation, and that the error had a substantial and injurious effect or influence on the jury's determination of its verdict. See Pope v. Zenon, 69 F.3d 1018. 1020 (9th Cir. 1995). After careful consideration of the record[1/] in this matter, this court finds that petitioner has made the required showing and is entitled to relief on his Fifth Amendment claim.

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1. The record before the court includes an audio cassette tape lodged by petitioner's counsel on February 6, 1995 in Case No. CIV S-92-1301. An accompanying declaration certifies that the audio cassette tape is a true copy of the tape recording of a statement by Bobby Gene Henry on September 6, 1988. The audio cassette tape is generally consistent with the transcript found in the record. (Clerk's Augmented Tr. on Appeal at 12-33.) This court finds a few portions of the interview designated "inaudible" in the transcript to be audible on the tape. The court also finds a few discrepancies between the tape recording and the transcript. The discrepancies are minor and not material to this court's analysis or recommendation.

A. Statements Obtained in Violation of Miranda

In Miranda v. Arizona the Supreme Court held that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that police must explain this right to him before questioning begins. 384 U.S. 436, 469-73 (1966). "[I]f a suspect requests counsel at any time during the interview, he [is] not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." Davis v. United States, 512 U.S. 452, 458 (1994) (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

To prevent police from badgering a defendant into waiving his previously asserted Miranda rights, "a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present." Davis, 512 U.S. at 458 (citing Minnick v. Mississippi, 498 U.S. 146 (1990)). The prohibition on further questioning is not itself required by the Fifth Amendment's prohibition on

coerced confessions but is justified by reference to its prophylactic purpose. See id. (citing Connecticut v. Barrett, 479 U.S. 593 598 (1987)). Invocation of the Miranda right to counsel requires only an unambiguous request for counsel, i.e., a request that a reasonable police officer in the circumstances would understand to be a request for an attorney. See id. at 459.

In the case at bar, any reasonable interrogating officer would have understood that petitioner was requesting an attorney when he asked, "[C]an I have my lawyer here," and when he further responded with an unequivocal "Yes, please" after one of the officers asked "You do want an attorney?" (Clerk's Augmented Tr. ("CAT-) at 14.) In spite of petitioner's unambiguous request for counsel, questioning continued and a statement was elicited from petitioner by the officers. The record reflects that each officer was aware that petitioner's statement was being taken in violation of Miranda and that the officers intentionally violated Miranda in order to obtain a statement for possible use in impeaching

petitioner if he testified at trial. Petitioner has demonstrated that his statements were obtained by police interrogators in violation of Miranda.

B. Error in Admitting the Statements

This court must next determine whether the state trial court committed error in permitting the prosecution to use petitioner's statements for impeachment purposes.

In Miranda, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id .at 473-74.

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective

> means . . . to notify the person of his right of silence and to assure that the exercise of that right will be scrupulously honored. . . ." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (quoting Miranda, 384 U.S. at 474, 479) (citations omitted).

"An accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him,' unless he validly waives his earlier request for the assistance of counsel." Smith v. Illinois, 469 U.S. 91, 94-95 (1984) (per curiam) (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

"Edwards set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel." 469 U.S. at 98; see also Solem v. Stumes, 465 U.S. 638, 646 (1984). "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." 469 U.S. at 98 (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983)).

To prevent violations of the bright-line rule, the Supreme Court has ruled that evidence obtained in violation of the Miranda requirements is "inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." James v. Illinois, 493 U.S. 307, 313 (1990). A defendant's incriminating statements obtained in violation of Miranda requirements may be introduced for the purpose of impeaching the credibility of the defendant's own testimony at trial, if the defendant's statements were

voluntary and reliable and "the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.'" Id., at 311-12 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)).

In Harris v. New York, the Supreme Court justified the creation of an exception to the exclusionary rule on the ground that "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Harris v. New York, 401 U.S. 222, 226 (1971). In Harris the defendant had asserted no claim that the statements he made to the police were coerced or involuntary, and his testimony at trial "contrasted sharply with what he told the police shortly after his arrest." Id. at 224-25. The Court explained that where a defendant's statements were not coerced or involuntary, the impeachment process

> undoubtedly provide[s] valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost

> . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Id. at 225. In carving out this exception to the exclusionary rule, the Court acknowledged that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," but held that the privilege "cannot be construed to include the right to commit perjury." Id. at 645. See also Walder v. United States, 347 U.S. 62, 65 (1954) (holding that there is no justification for letting a criminal defendant "affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility").

On the other hand, "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, 'even though there is ample evidence aside from the confession to support the conviction.'" Mincey v.

Arizona, 437 U.S. 385, 397-98 (1978) (quoting Jackson v. Denno, 378 U.S. 368, 376 (1964)). See also Oregon v. Hass, 470 U.S. 714, 722 (1975); Harris, 401 U.S. at 224.

The test of voluntariness is well established: "'Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.'" Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)), cert. denied, 502 U.S. 1031 (1999). If a statement was not the product of a rational intellect and a free will, a conviction arising from the use of the statement cannot stand. See Mincey v. Arizona, 437 U.S. at 398 (citing Townsend v. Sain, 372 U.S. 293, 307 (1963), and Blackburn v. Alabama, 361 U.S. 199, 208 (1960)). Psychological as well as physical coercion is proscribed, for "'the blood of the accused is not the only hallmark of an unconstitutional

inquisition.'" Mincey, 437 U.S. at 401 (quoting Blackburn, 361 U.S. at 206).

Determination of whether a statement is voluntary requires an evaluation of all the circumstances of the interrogation. See Mincey, 437 U.S. at 401. More precisely, in evaluating the voluntariness of a confession, the court must determine "'whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.'" Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1990) (quoting United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988)), cert. denied, 502 U.S. 853 (1991). A confession is involuntary within the meaning of the Due Process Clause only if the police used coercive activity to undermine the suspect's ability to exercise his free will. See Colorado v. Connelly, 479 U.S. 157, 163 & n.1, 167 (1986); Oregon v. Elstad, 470 U.S. 298, 305 (1985); Derrick, 924 F.2d at 818. The presence of police

overreaching is a crucial element. See Derrick, 924 F.2d at 818.

The ultimate question of "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." Miller v. Fenton, 474 U.S. 104, 112 (1985); see also Derrick, 924 F.2d at 817. Only the state court's subsidiary factual determinations underlying the issue of voluntariness are entitled to a presumption of correctness. See Miller v. Fenton, 474 U.S. at 112; LaVallee v. Delle Rose, 410 U.S. 690, 693-95 (1973) (per curiam); Townsend v. Sain, 372 U.S. 293, 306 (1963); Derrick, 924 F.2d at 817.

The United States Court of Appeals for the Ninth Circuit has analyzed the circumstances under which statements made by a suspect in custody are compelled or coerced in violation of the Fifth Amendment. In Cooper v. Dupnik, a civil rights action, police officers testified that

they began their interrogation of Cooper with a premeditated plan to ignore the suspect's constitutional right to remain silent as well as any request he might make to speak with an attorney. Cooper v. Dupnik, 963 F.2d 1220, 1224 (9th Cir.), cert. denied, 506 U.S. 953 (1992). "Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in chief, they hoped it would be admissible for purposes of impeachment if the suspect ever went to trial." Id. They expected that the confession they obtained would hinder any possible insanity defense and prevent the suspect from testifying at trial that he was innocent. See id. Accordingly, the interrogators simply ignored the suspect's invocation of his rights and continued to question him for more than four hours in an unsuccessful attempt to force a confession. See id. at 1228-32. The suspect "was reduced to a state of agitation and anxiety marked by tears and sobbing." Id. at 1231.

In deciding that the plaintiff stated a cause of action under 42 U.S.C. § 1983 for a violation of his Fifth Amendment rights, the court found that

> Barkman and his companions conspired not only to ignore Cooper's response to the advisement of rights pursuant to Miranda, but also to defy any assertion of the Constitution's Fifth Amendment substantive right to silence, and to grill Cooper until he confessed . . . Cooper's interrogators tried first to trick him into foregoing his right to silence by turning the Miranda advisement into a farce. . .
>
> When Barkman's trick failed, the Task Force turned to interrogation tactics that by any measure were impermissibly coercive. The clear purpose of these tactics was to make Cooper talk, and to keep him talking until he confessed. The Task Force refused to honor Cooper's rights when Cooper asserted them, and simply continued questioning him as if no request for counsel had been made.

Id. at 1242-43. The court observed that "'any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show the defendant did not voluntarily waive his privilege.'" Id. at 1249-43 (quoting Miranda, 384 U.S. at 476). The court also noted that the custodial environment "'carries its own badge of intimidation,'" and "'the

compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.'" Id. at 1242 (quoting Miranda, 384 U.S. at 456-58, 461).

In Collazo v. Estelle, a habeas corpus proceeding, the Ninth Circuit Court of Appeals held that a police officer's attempt to discourage the defendant from speaking to a lawyer was not "compatible with a system of justice that does not permit police coercion." Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (en bane), cert. denied, 502 U.S. 1031 (1992). After Collazo was arrested, he was escorted to an interview room at the police station and was advised of his rights by Officer Rolen. After some discussion, Collazo asked to talk to his lawyer. Instead of respecting Collazo's request, Officer Destro "attempted to pressure him into dispensing with counsel and talking to them about the homicide," stating, "Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police.

Then it might be worse for you." After a few more comments by the officers, including a reiteration that it might be worse for him if he did not talk to them, the officers left Collazo in the interview room. Collazo was allowed to call and then to see his wife, who came to the police station and had a lengthy discussion with him. Approximately three hours after the officers had left the interview room, Collazo asked a sergeant where the investigators were. The sergeant, construing the inquiry as a request to talk to the investigators, summoned the officers. After the officers again advised Collazo of his Miranda rights, Collazo confessed to his role in the crimes for which he had been charged and arrested. See id. at 413-14.

The court found that the officer's initial pressure on the defendant was coercive and carried over to taint the defendant's subsequent waiver of Miranda rights and confession. Id. at 416 & n.5. In so finding, the court considered the menacing character of the officer's statements, the fact that the statements were "calculated to

pressure Collazo into changing his mind about remaining silent, and into talking without counsel to his interrogators," and the implication that the defendant would be penalized for exercising rights guaranteed to him under the United States Constitution. Id. at 416-17. The court analyzed the Fifth Amendment violation as follows:

> We are not unaware of the complex challenges faced by law enforcement officers as they discharge their important and difficult responsibilities in accord with Constitutional principles and the rules designed to protect them. Nevertheless, this is a nation where the rule of law prevails, where ends do not justify inappropriate means. Miranda had been part of our law since 1966. Most law enforcement officers abide faithfully by its requirements even though they find them on occasion to be frustrating. As long as Miranda is on the books, it must be respected. In this case, it was not honored. It was disobeyed.
>
> . . . .
>
> Based on the foregoing, our plenary review of the tactics used by Officer Destro in an attempt to pressure Collazo into talking to his adversaries leads us to a two-part conclusion. First, Officer Destro's tactics add up to a flagrant breach of the prophylactic rules established by the Supreme Court in

> Miranda and its progeny to protect a defendant's Constitutional right against self-incrimination. Second, Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses. Officer Destro's gambit was inconsistent with Collazo's Fifth Amendment right against self-incrimination as well as his right to consult an attorney. His inquisitorial stratagem was calculated to break Collazo's will. As such, it offends due process as guaranteed by the Fourteenth Amendment.

Id. at 419-20.

In a case with facts similar to those of the case at bar, the California Court of Appeal held that statements made by a suspect to police officers after he invoked his right to an attorney were coerced. People v. Bey, 21 Cal. App. 4th 1623 (1993). In Bey, the defendant was interviewed by two detectives for only fifteen minutes. The defendant was asked several questions and was then advised of his Miranda rights. The defendant stated three times that he would not talk to the police without an attorney. One of the detectives then stated, "Let me explain something to you,

James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court." After the defendant reiterated his intention not to talk, the detectives told the defendant that incriminating physical evidence had been found in his apartment. The defendant again responded that he would not say anything without his attorney. One of the detectives then asked, "Why don't you tell me what happened that night?" In response to numerous questions from the officers, the defendant gave an account of the events on the night of the murder which was inconsistent in some respects with his testimony at trial, but he did not confess to the crime. See id. at 1626-27.

At trial, one of the officers testified that he had continued to question the defendant so that, if the defendant did take the stand, his testimony could be impeached. The officer admitted that he had attended seminars where it was suggested as a tactic to keep asking questions even after a suspect invoked his or her rights in order to obtain

statements that could be used for impeachment at trial. See id. at 1627. In reaching its conclusion that the defendant's statements were coerced, the court stated:

> It is apparent that Detective Bennett was attempting to capitalize on the rule stated in Harris v. New York, which allows the use of statements taken in violation of the prophylactic Miranda rules to impeach conflicting testimony by the defendant, even though the statements are not admissible in the prosecution's case in chief. But if the accused's statements are involuntary, the Supreme Court has mandated the exclusion of such evidence for all purposes, including impeachment.
>
> This is a very troubling case, presenting a deliberate police violation of Miranda coupled with a misrepresentation to [the defendant] about the legal consequences of that violation.
>
> . . . .
>
> We exercise independent review of the uncontradicted evidence and are compelled to conclude that under these circumstances, [the defendant's] statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony. The fact that he did not actually confess to the crime does not change the result. His statements were the product of illegal police coercion.

21 Cal. App. 4th at 1627-28 (citations omitted).

In the case before this court, the state trial court found that officers Machen and White intentionally violated petitioner's Miranda rights in order to obtain petitioner's statements for possible use in impeaching him if he testified at trial. (Reporter's Augmented Tr. at 4.) The court found, however, that petitioner's statements "were voluntary and not the result of coercion." (*Id.*) In this habeas proceeding, the court must review de novo the state trial court's legal conclusion that the police officers did not coerce petitioner's statements and did not thereby render petitioner's statements involuntary. See Derrick, 924 F.2d at 818; Collazo, 940 F.2d at 415.

Two officers interviewed petitioner. (CAT at 12.) During the interview, Sheriff's Detective White initially questioned petitioner about such matters as his address, possible disposition of his car, his ex-wife's name, address and telephone number, the keys that were in petitioner's car, his place of birth, place of employment, job title, work

telephone number, and Social Security number. (CAT at 12-13.) When petitioner was asked whether he had ever been arrested before, petitioner responded, "No sir." (CAT at 13.) After additional questions about whom to notify in case of an emergency, how long petitioner had been divorced, and another telephone number, Detective White told petitioner that he was under arrest for murder and then advised him of his rights. (CAT at 14.) Petitioner responded by asking if he could have his lawyer there, then said he probably should have a lawyer, and finally confirmed that he wanted an attorney. Detective White asked, "Why did you shoot him anyway?" When petitioner responded "Pardon?" the officer asked "Why did you shoot him?" (CAT at 14.) The officers proceeded to interrogate petitioner for about an hour. (CAT at 14-33.)

In response to the officer's initial questions as to why he shot Withrow, petitioner said that Withrow had cheated him out of money, that he was losing his property, that he couldn't figure out how much money was at issue,

and that he had written checks to Withrow. (CAT at 34.) He interrupted himself to ask whether he was supposed to keep talking without an attorney, whereupon Detective White interrupted him to say, "Listen, what you tell us we can't use against you right now." (CAT at 4.) Petitioner responded "Okay," and the officer said. "We'd just like to know." (Id.) Petitioner then embarked on an account that began "It started two years ago after the divorce" and included not only information about petitioner's dealings with Bill Withrow but also petitioner's divorce, his property, his automobile accident and head injury, his job, his guns, his children, deer hunting, an old vehicle his brother-in-law was fixing, Viet Nam, taking his trailer up in the woods, and his ambition to be a highway patrolman. (CAT at 4-22.) Petitioner's statements were rambling, disjointed, often unresponsive to the questions asked by the officers, sometimes virtually incoherent, and occasionally inaudible.

The two threshold questions that invited petitioner's statements were plainly focused on petitioner's motive and

intent: "Why did you shoot him anyway" and "Why did you shoot him." (CAT at 14.) Later the officer asked yet another question addressed to petitioner's intent: "So this morning when you were just going over there to scare him?" (CAT at 23.) Shortly thereafter the officer asked, "When you got over to the office what happened?" (Id.) Petitioner's answer was not responsive. The officer then made a comment concerning petitioner's intent: "Well it sounds to me like you lost control of it for a while. Ah ah (inaudible) from what you've told us so far your intentions wern't [sic] to go over there wasn't to shot [sic]." (CAT at 24.) A few minutes later the officer said, "Getting back to the weapons. What transpired today (inaudible) when Bill ah standing up or sitting down when this all started?" (CAT at 27.) Toward the end of the interrogation, the officer said, "The way this was handled after this happened and you left and went over to (inaudible)" and asked "Any reason why you went to Baseline." (CAT at 31.)

Officer White's statement that "what you say can't be used against you right now" was designed to undermine petitioner's exercise of his right to control the time at which questioning occurred, the subjects discussed, and the duration of the interrogation. The officer's statement was intended to convey the impression that any statements made by petitioner would not be used against him at all. The further statement that "we just want to know" reinforced that impression by suggesting that the officers merely sought to satisfy their curiosity. Accordingly, this court finds that petitioner's will was overcome by the officers' tactics and that he continued to talk to the officers only as a result of their use of deception.

While the mere use of deception by a police officer does not render a confession involuntary, see Frazier v. Cupp, 394 U.S. 731, 737-39 (1969), deception used as it was here, to deprive the defendant of his Fifth Amendment rights, may render a defendant's statement involuntary. Petitioner was tricked into making a statement outside the

presence of counsel. Petitioner's self-direction was lost when the officers assured him that any statements he made to them could not be used against him "right now" and that they "just wanted to know." As a result, petitioner's statements were not the product of a rational intellect but resulted from psychological coercion. The clear purpose of the officers' tactics was to make the defendant talk and to keep him talking in the hope that he would make statements that could be used to impeach him at trial concerning his intent.

Respondents assert that Officer White's statements must be interpreted in light of his undisclosed knowledge that the defendant's statements could, in fact, be used for impeachment purposes. Under that interpretation, respondents argue, the phrase "right now" renders the statement technically correct because the statements could be used against petitioner only "later." This interpretation is unpersuasive. Any use of petitioner's statements, whether for purposes of the officers' arrest report, an information, a

preliminary hearing, or trial, would necessarily occur "later" rather than "right now." Moreover, even if the officer's statement could be deemed technically correct by virtue of his understanding that petitioner's statements could be used only for impeachment, the officer's non-disclosure of this material fact, or his utterance of a half-truth, was the equivalent of a complete misrepresentation. The words spoken by Officer White "were calculated to pressure [petitioner] into changing his mind about remaining silent, and into talking without counsel to his interrogators." Collazo, 940 F.2d at 416. This pressure rendered petitioner's statements involuntary.

This court also finds that petitioner's statements to the police are of dubious reliability for the purpose for which they were offered and admitted at trial. The statements were offered to impeach petitioner's assertion of self-defense by showing that he did not mention self-defense during the interview with police. However, the officers did not conduct a structured interview but rather asked questions designed to

keep petitioner talking after he requested an attorney. Petitioner rambled and cried at times during the interview. It is questionable whether, under these circumstances, petitioner provided a complete or accurate account of his actions or his motives.

The reliability of petitioner's statements to the police is further undercut by the fact that they do not directly contradict and may not even "contrast sharply" with petitioner's testimony at trial. Cf: Harris, 401 U.S. at 225. In the interview and at trial, petitioner stated that he went to Withrow's office to scare him. (CAT at 21; RT at 1076-77.) In the interview and at trial, petitioner said he was afraid of Will Estey. (CAT at 22, 29; RT at 1062.) The fact that petitioner did not mention self-defense to the officers during their improper interrogation does not directly contradict petitioner's defense and therefore does not justify use of petitioner's statements for impeachment purposes. In the absence of evidence that petitioner "affirmatively resort[ed] to perjurious testimony" when he claimed

self-defense, use of petitioner's statements for impeachment purposes does not serve the purpose advanced for the exception to the exclusionary rule. See Harris, 401 U.S. at 224.

Even if petitioner's statements could be deemed both voluntary and reliable, the statements should not have been admitted for purposes of impeachment in this instance because such admissibility encourages the very police misconduct that occurred in this case. Officer Machen testified that he "quite often," indeed "quite regularly," continues to question suspects after invocation of their rights because he is aware that such statements can be used for impeachment purposes and it is his understanding that he can continue to question a suspect after the suspect requests a lawyer. (CT at 408-12, 415-16.)

In Bey, the California Court of Appeal observed that it is not a new tactic to attempt to take statements in violation of the prophylactic Miranda rules in order to impeach conflicting testimony by the defendant. 21 Cal.

App. 4th at 1627. Some five years prior to the Bey decision, Justice Mosk criticized the Harris rule for opening the door to this tactic:

> [T]he Harris rule does not carry sufficient deterrence. In cases in which the police believe they can obtain the evidence they seek only by violating the law, the Harris rule practically invites unlawful conduct by allowing the prosecution to use the evidence for impeachment. By contrast, a broad exclusionary rule deters such improper police conduct by denying the prosecution any benefit that might flow therefrom.
>
> The harm threatened by the Harris rule has not escaped the notice of commentators. One has asserted that "Harris permits law enforcement officials to obtain confessions or statements directly related to the issue of guilt by illegal means and hold such evidence as a warning to the accused not to take the stand and contradict his prior utterance." Why the police may act in this fashion is plain: "it is widely acknowledged that a defendant—at least one without a criminal record—who takes the witness stand and tells his story has a considerably better chance of acquittal than one who stands mute."
>
> Professors Dershowitz and Ely also observe that "The Miranda situation is . . . tailor-made for a sequential 'try it legally—if you fail, try it illegally' approach. That is, the police can attempt to obtain a statement

> admissible in the case in chief by giving the required warnings. If, however, the suspect requests a lawyer, they can then (instead of honoring the request and thereby losing the statement) go on——given Harris——to try far an uncounselled statement to use for impeachment."
>
> . . . . "By thus restoring the value of statements obtained without warning suspects of their rights, Harris may well encourage police to ignore Miranda."
>
> Regrettably, the fear that Harris may encourage unlawful police conduct has been fulfilled.

People v. May, 44 Cal. 3d 309, 333-34 (1988) (Mosk, J., dissenting) (citations omitted).

In the instant case, the likelihood that admissibility of petitioner's statements would encourage police misconduct is not a mere speculative possibility. The officers admitted that they habitually engage in such misconduct in order to obtain incriminating statements that can be used for impeachment. To admit petitioner's statements in this context can only encourage law enforcement officers to continue to resort to unacceptable tactics to circumvent

Miranda. See Pope v. Zenon, 69 F.3d 1018, 1024 (9th Cir. 1995) (citing Collazo, 940 F.2d at 4~3).

C. Effect of the Statements on the Jury's Verdict

Having determined that petitioner's statements to the police officers were involuntary and therefore inadmissible for any purpose, the court must now decide whether admission of the statements for purposes of impeachment was harmless error. See Arizona v. Fulminante, 499 U.S. 279, 295 (1991) (holding that a harmless error analysis applies to coerced confessions); Pope, 69 F.3d at 1025. "But, we conduct this analysis with an awareness that 'a confession is like no other evidence'" and may have a "'profound impact'" on the trier of fact. Pope, 69 F.3d at 1025 (quoting Fulminante, 499 U.S. at 296). Since a defendant's confession "is probably the most probative and damaging evidence that can be admitted against him," Fulminante, 499 U.S. at 296, a careful review of the record must be undertaken to determine whether the

improper admission of petitioner's statements had a substantial and injurious effect on the verdict in his case.

Petitioner testified at trial as follows:

> Petitioner had seen Bill Withrow with guns at home and at the office. (RT at 1051-52.) Once he went to Withrow's office to pick up a check and, when he found the check was not in the amount he expected, he grabbed Withrow's tie. After he released Withrow's tie, Withrow told him he was lucky that something hadn't happened and that if something like that ever happened again, he'd have something for him. (RT at 1052-54.) When petitioner asked Withrow if he was talking about the gun he kept in his desk, Withrow didn't respond but had "a smerky [sic] grin on his face." (RT at 1054.) Petitioner had been told that a man named Estey, who was one of Withrow's associates, was a Hell's Angel and was involved with drugs. (RT at 1054, 1061-62.) Petitioner was afraid of both Estey and Withrow. (RT at 1062.)
>
> On September 6, 1988, petitioner called in sick. He began to get his camping gear together for a trip he planned to take later that week, and he intended to put a rebuilt carburetor in his truck that day so it would be ready for the trip. (RT at 1067.) During that morning, petitioner called Withrow to find out if he had sold some stock he was supposed to sell for petitioner. (RT at 1068.) After Withrow's secretary put petitioner on hold

twice, Withrow came on the line and said he was busy and he'd call petitioner back. (RT at 1069.) Petitioner was angry at being put off again. He went to his bedroom and got two of his guns. (RT at 1070.)

Petitioner, who bought his first handgun when he was thirteen, had had one of the guns since 1972 and the other since about 1983 or 1984. (RT at 1070-71.) In the military, petitioner had learned to shoot with either hand. (RT at 1071.) He kept his guns loaded at the house for protection and because of his fear of Hells Angels and Withrow. (Id.) He put the guns in his briefcase, dressed, and took the briefcase out to his car. (RT at 1071-73.) He was not thinking about killing Withrow and was not thinking about a plan to go kill Withrow but took the guns to protect himself from Withrow and his Hells Angel friends. (RT at 1073-74.) Petitioner also put the carburetor from the pickup in the back of the car. (RT at 1073-75.) During the drive to Withrow's office, petitioner was not thinking about killing Withrow, but he was very mad at him and intended to scare him by yelling at him. (RT at 1076-77.) He took the guns with him to protect himself because he knew Withrow had a gun in the office and it was possible that Estey might be there. (RT at 1075, 1077.)

Petitioner drove to Withrow's office and was sent in by Withrow's secretary. (RT at 1077-79.) Petitioner did not close the door to Withrow's office because he was planning to yell at Withrow and try to embarrass him or

humiliate him in front of the people who worked in the building. (RT at 1079.) He was not planning to kill Withrow. (RT at 1079-80.) He put his briefcase in a chair and unsnapped the latches but didn't open the briefcase. (RT at 108081.) Withrow asked petitioner to shut the door, and petitioner refused. He said he wanted everybody in the building to hear what he had to say to him and what he was going to call him. (RT at 1081.) Then petitioner started yelling at Withrow. (RT at 1082.) Withrow said they were making money, and he rolled back from the desk to open a file cabinet on his left. (RT at 1083.) Withrow grabbed a folder and threw it towards petitioner, and it landed on the desk in front of petitioner. (RT at 1084.) Petitioner said he couldn't believe anything in the folder, whereupon Withrow laughed or smiled. (RT at 1085.) Petitioner asked Withrow if he thought it was funny, and Withrow replied that no one was going to keep him from being famous. (RT at 1086.) Withrow reached for the drawer where petitioner believed he kept a gun. (RT at 1086-87.) Petitioner thought Withrow was reaching for a gun in the drawer. He went for his own guns because he thought Withrow was going to take his gun out and shoot him. (RT at 1087.) Petitioner did not shoot Withrow just because he was angry, nor did he shoot Withrow just because Withrow owed him money. (RT at 1088.) Petitioner grabbed both guns because of his military training, where he had learned that in a life or death situation you don't spare ammunition,

> because a wounded man can kill you. (RT at 1090.)

After petitioner testified, the prosecution called Detective Machen as a rebuttal witness and introduced the tape-recorded interview of petitioner to show that petitioner did not tell the police officers that he killed Withrow in self-defense and did not say that he believed Withrow was reaching for a gun the day that petitioner shot him. (RT at 1341-43.) In closing argument the prosecutor referred the jury to the interview transcript and argued that during the interrogation petitioner "couldn't give an answer why he took those guns or he didn't want to admit why he took them." (RT at 1462.) He referred to petitioner's reason for shooting Withrow as "the crux of this case." (Id.)

The prosecutor's use of the improperly admitted statements goes to the root of the state's burden to prove beyond a reasonable doubt that petitioner did not act in self-defense and did act with the intent required for a conviction of first or second degree murder. This use of the

inadmissible statements had a substantial effect on the verdict. No other evidence of motive or intent could have impressed the jury in the same way that petitioner's own statements did. This court cannot conclude that the error in admitting petitioner's statements was harmless.

II. Right to Privacy Claim

Petitioner's second claim was presented to the California Supreme Court for the first time in a habeas petition. Respondents contend that the claim is procedurally barred.

Based on concerns of comity and federalism, federal courts will not review a habeas petitioner's claim if the state court decision denying relief on that claim rests on a state law ground that is independent of federal law and adequate to support the judgment. See Coleman v. Thompson, 501 U.S. 722, 729 (1991); Harris v. Reed, 489 U.S. 255, 260-62 (1989). Generally, the only state law grounds meeting these requirements are state procedural rules. However, the state procedural rule relied upon is not

adequate if the rule appears to be discretionary. See Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). Moreover, failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court. See id.,; see also Kim v. Villalobos, 799 F.2d 1317, 1321 (1986). In addition, if the state court "fails to articulate that state procedural grounds form an independent basis for the decision so that the federal court is left to conjecture concerning whether the matter was disposed of on a separate and independent state ground, the decision will be insufficient to bar federal review." Karis v. Vasquez, 828 F. Supp. 1449, 1460 (E.D. Cal. 1993); see also Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert. denied, 115 S.Ct. 1175 (1995).

In this case, the California Supreme Court denied petitioner's application for a writ of habeas corpus with citations to In re Waltreus, 62 Cal. 2d 218, cert. denied sub nom. Waltreus v. California, 382 U.S. 853 (1965), and In

re Dixon, 41 Cal. 2d 756 (1953). In Waltreus the court held that claims raised on direct appeal cannot ordinarily be relitigated in a subsequent collateral challenge to the conviction. 62 Cal. 2d at 225. Since petitioner did not raise his privacy claim on direct appeal, the citation to Waltreus is not applicable to petitioner's privacy claim.

In Dixon, the California Supreme Court held that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." In re Dixon, 41 Cal. 2d at 759. Thus, in citing Dixon, the California Supreme Court denied petitioner's privacy claim as procedurally barred. For purposes of procedural default analysis, however, a discretionary state rule cannot bar federal habeas corpus review. See Siripongs, 35 F.3d at 1318. The rule of Dixon is, by its terms, discretionary. It admits of the possibility of "special circumstances

constituting an excuse" for failure to raise a claim by way of direct appeal; when such circumstances are found, the California Supreme Court may entertain the claim. See Karis, 828 F. Supp. at 1462-63. Consequently, the citation to Dixon is not adequate to bar federal habeas corpus review of petitioner's privacy claim.

The court turns to the merits of petitioner claim that the trial court's admission of his statements to Dr. Sander violated petitioner's constitutional right to privacy.

On the third day of trial, the prosecutor requested admission of statements made by petitioner to Dr. Sander in April of 1988. (CT at 430-38.) The court held a hearing on the admissibility of the statements; both petitioner and Dr. Sander testified. (CT at 429.)

Dr. Richard Alan Sander testified that he is a medical doctor, that his various specialties include occupational medicine, that he is not a licensed psychiatrist or therapist, and that he was employed at McClellan Air Force Base as chief of occupational medicine services from

approximately February of 1988 to about August of 1989. (RT at 102-05.) On April 21, 1988, Dr. Sander interviewed petitioner in his office. (RT at 114-15.) Dr. Sander took notes of the interview but did not file them in petitioner's of official medical records because of the personal nature of the interview. (RT at 118-19, 137.) When an employee came to the clinic to talk about stress on the job, Dr. Sander did not perform a physical examination but rather talked to the person to triage the person's mental condition and determine whether the person should return to work, go home, or seek professional care. (RT at 125-26.) Dr. Sander had some psychiatric training in medical school and also had some training in counseling. (RT at 126.) Petitioner came to the clinic because he was having some emotional dysfunction and was referred by his supervisor, Joe Lambert. (RT at 128.) Mr. Lambert had called the clinic and indicated that petitioner was "about to explode." (RT at 129.) At the conclusion of the interview with petitioner, Dr. Sander recommended that he go see a psychiatrist. (RT at 142.)

Petitioner testified that Joe Lambert, his supervisor at McClellan Air Force Base in April of 1988, became concerned about him after he walked off the job and was absent for a couple of days. (RT at 146-48.) Lambert advised petitioner to talk to someone at the base clinic. (RT at 148.) Petitioner went to the clinic and was interviewed by Dr. Sander, whom he had not seen previously. (RT at 150.) The interview took place in an office, and the doctor took notes. (RT at 151.) When Lambert referred petitioner to the clinic, petitioner thought he was going to see "a base shrink," and he believed that he was talking to a psychiatrist when he discussed his mental problems with Dr. Sander. (RT at 152.) Petitioner had seen a psychiatrist once before, and the interview with Dr. Sander was similar to his previous visit to a psychiatrist. (RT at 151-59.)

The defense opposed introduction of Dr. Sander's testimony and notes on the ground that the matter was privileged under state law recognizing a psychotherapist-patient privilege. (RT at 174-80.) The trial

court found that Dr. Sander was a medical doctor and that Dr. Sander did not devote a substantial portion of his time to the practice of psychiatry. The court also found that it was not reasonable under the circumstances for petitioner to believe that Dr. Sander was a psychiatrist. Accordingly, the court ruled that the records and communication at issue were not privileged under California Evidence Code § 1014, which defines the state psychotherapist-patient privilege.[2/] (Reporter's Augmented Tr. at 5-6.) At trial, Dr. Sander was called by the prosecution. (RT at 855.) The prosecution was allowed to introduce Dr. Sander's notes, which revealed that petitioner was suffering from stress and said he felt like

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2. California law provides that, "[e]xcept as otherwise provided by statute . . . [n]o person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing." Cal. Evid. Code § 911. The privileges contained in the California Evidence Code are exclusive, and California courts are not free to create new privileges as a matter of judicial policy. See Valley Bank of Nevada v. Superior Court, 15 Cal.3d 652, 656 (1975); Garstang v. Superior Court, 39 Cal.App.4th 526, 532 (1995). There is no general physician-patient privilege in a criminal proceeding. Cal. Evid. Code § 998. The definition of "psychotherapist" for purposes of the psychotherapist-patient privilege does not include a physician unless the physician "devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry." Cal. Evid. Code § 1010.

killing various people he worked with at the base and "the real estate agent who cheated him." (RT at 866, 871-73, 877-78, 880-83.)

Petitioner contends that admission of his statements to Dr. Sander harmed him because, aside from the statements to police that should have been suppressed, the statements to Dr. Sander were the only concrete evidence that petitioner's motive for killing Withrow might have been revenge rather than self-defense. Petitioner argues that the federal constitution protects an individual's interest in avoiding disclosure of personal matters including medical information, and that the right of privacy protecting doctor-patient communications may be breached only upon a showing of a compelling state interest. According to petitioner the government made no showing of a compelling state interest in the disclosure of petitioner's interview with Dr. Sander, and the trial court did not balance petitioner's right of privacy against the state's request for disclosure; rather, the trial court relied on its determination that the

communication was not privileged because Dr. Sander was not a psychiatrist nor a psychotherapist. Petitioner concludes that he was prejudiced by the trial court's ruling because it enabled the prosecutor to use Dr. Sander's testimony to impugn petitioner's assertion that he killed Withrow in self-defense.

The right of privacy exists under the federal constitution and finds its roots in the First, Fourth, Fifth, and Ninth Amendments, as well as in the penumbra of the Bill of Rights and in the concept of liberty guaranteed by the Fourteenth Amendment. See Roe v. Wade, 410 U.S. 113, 152 (1973). Although the right of privacy is not expressly protected, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for habeas relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir.), cert. denied, 449 U.S. 922 (1980));

see also Lisenba v. California, 314 U.S. 219, 236 (1941). In order to raise such a claim in a federal habeas corpus petition, the error alleged must have resulted in "a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962). See also Crisafi v. Oliver, 396 F.2d 293, 294-95 (9th Cir.), cert. denied, 393 U.S. 889 (1968); Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960), cert. denied, 364 U.S. 934 (1961).

The Ninth Circuit Court of Appeals has found a "substantial constitutional right of privacy that extends to psychotherapist-patient communications" in civil actions, see Caesar v. Mountanos, 542 F.2d 1064, 1067 n.9 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977) but the right is "conditional rather than absolute" and may be impaired. In Re Grand Jury Proceedings, 867 F.2d 562, 564-65 (9th Cir.) (declining to recognize psychotherapist-patient privilege), cert. denied sub nom Doe v. United States, 493 U.S. 906 (1989).

The United States Supreme Court has recently recognized a psychotherapist-patient privilege. Jaffee v. Redmond, ___ U.S. ___, 116 S. Ct. 1923 (1996) (abrogating In re Grand Jury Proceedings, 867 F.2d 562, and other court of appeals decisions declining to recognize a psychotherapist privilege under Rule 501). The Jaffee court acknowledged the "'fundamental maxim that the public . . . has a right to every man's evidence.'" 116 S. Ct. at 1928 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). Thus, any examination of a claim of privilege must "'start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'" Id. Such exemptions are justified where a public good transcends the principle of using all rational means for ascertaining the truth. See id. (citing Trammel v. United States, 445 U.S. 40, 50 (1980)). "[A] privilege protecting confidential communications between a psychotherapist and her patient

'promotes sufficiently important interests to outweigh the need for probative evidence.'" Id., (quoting Trammel, 445 U.S. at 51). Accordingly, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." Id. at 1931.

The Court looked exclusively to the Federal Rules of Evidence for authorization to recognize a patient-psychotherapist privilege:

> Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." The authors of the Rule borrowed the phrase from . . . in Wolfle v. United States, 291 U.S. 7, 12 (1934), which in turn referred to the oft-repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis."

116 S. Ct. at 1927 (citations and footnotes omitted).[3/] The Court expressly rejected any balancing of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure." Id. at 1932. Such a balancing component would eviscerate the effectiveness of the privilege, for "'[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" Id. (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

The therapy relationship at issue in Jaffee involved counseling provided by a licensed clinical social worker to a police officer. Id. at 1926. Although "all 50 States and

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3. Rule 501 provides only a general rule regarding privilege: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. The Federal Rules of Evidence apply to civil and criminal cases and proceedings. Fed. R. Evid. 1101 (b). "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Fed. R. Evid. 1101(c).

the District of Columbia have enacted into law some form of psychotherapist privilege," the states have diverged on the types of therapy relationships protected and the exceptions recognized. Id. at 1929-30 & n.13. The Supreme Court concluded that the reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a licensed social worker. Id. at 1931. The Court declined to delineate the full contours of the newly recognized privilege but noted, "[We do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Id. at 1932 n.19.

The aspects of Jaffee summarized above, i.e., the analysis of the patient-psychotherapist privilege in evidentiary rather than constitutional terms, affirmation of the general rule disfavoring testimonial privileges, rejection of any balancing of a patient's interest in privacy against the evidentiary need for disclosure, and the holding that the

newly recognized patient-psychotherapist privilege is not absolute, lead this court to conclude that petitioner's challenge to the admissibility of Dr. Sander's testimony and notes must be analyzed as an objection to a state court's evidentiary ruling. Violation of a state evidence rule does not constitute grounds for federal habeas corpus relief absent a due process violation that renders the trial fundamentally unfair. See Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Pulley v. Harris, 465 U.S. 37. 41 (1984). Thus, whether petitioner's privacy claim is a claim of error based on a right not specifically guaranteed by the Constitution or a claim of error in the application of state law, petitioner cannot prevail except upon a showing of fundamental unfairness or complete miscarriage of justice. This court finds that petitioner has not made such a showing.

At petitioner's trial, Catherine Carter and Cathy Raymes both testified that petitioner had complained to them about Withrow's handling of petitioner's money and

property. (RT at 436, 443, 899-900.) Cathy Raymes further testified that petitioner commented to her, six or seven weeks before Withrow was killed, that he or somebody should do the world a favor and kill Bill Withrow, and he said he was surprised that no one else had done it before. (RT at 90305.) Thus, Dr. Sander's testimony did not constitute the only evidence that petitioner had said he felt like killing Withrow, nor did his testimony provide the only evidence that petitioner could have been motivated by revenge. On this record, the court finds that petitioner has failed to demonstrate that the admission of Dr. Sander's testimony and notes so fatally infected petitioner's trial as to render it fundamentally unfair or that the violation of petitioner's privacy resulted in a complete miscarriage of justice. Accordingly, petitioner is not entitled to relief on his second claim.

For the reasons set forth above, IT IS HEREBY RECOMMENDED that

1. Petitioner's application for a writ of habeas corpus be granted; and

2. A writ of habeas corpus be issued commanding the State of California to vacate and set aside petitioner's conviction of second degree murder with personal use of a firearm in the case of People v. Bobby Gene Henry, case number 87841 of the Superior Court of the County of Sacramento, unless, within sixty days of the entry of judgment herein, the State of California grants petitioner a new trial in which petitioner's statements to police on September 6, 1988, are not admitted as evidence for any purpose.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file and serve written objections with the court. The document should be captioned "Objections to Findings and Recommendations."

Any reply to objections shall be filed and served within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). DATED: June 5, 1997.

/S/

UNITED STATES MAGISTRATE JUDGE

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